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Office Supreme Court, U.

Supreme Court of the United

OCTOBER TERM, 1933.

No. 2

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 834.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI.

On page two of its petition, petitioner gives the "questions presented." We will answer these in the order given.

Petitioner's First Question.

"Whether under the jurisdictional act which authorizes the Court of Claims to 'render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs,' there is authority to award a judgment against the United States arising out

> of its failure in its alleged duty as guardian of the tribe to secure the restoration to said tribe of possession of lands owned by the tribe."

Petitioner is in error in suggesting that we claim under a common-law liability based upon the relationship of guardian and ward. While petitioner was under a duty assumed by treaty to put respondent in possession of this land, even this need not be relied upon. Congress in 1906, after "extensive investigations as to every phase of the controversy," declared, in explicit language, that the land in dispute belonged to the Creek Nation (R. p. 17). It also passed Section 18 of the Act of April 26, 1906 (34 Stat. 137). The relevant parts of such Section 18 are as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes . . . for . . . recovery of any land claimed by any of said tribes . . ., and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits. . . ."

That above act, although permissive in form, was in fact mandatory is well settled. 25 R. C. L. 770; *Supervisors* v. *U. S.*, 4 Wall. 435, 18 U. S. (L. Ed.) 419; *French* v. *Edwards*, 13 Wall. 506, 20 U. S. (L. Ed.) 702; *Jaffray* v. *McGehee*, 107 U. S. 361, 27 U. S. (L. Ed.) 495.

Petitioner's Second Question.

> "(2) Whether, if the tribe is entitled to recover, the measure of damages should be the full value of the fee as of the time of filing the peti-

tion, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits."

Congress finding its former mandates unheeded passed the jurisdictional act which is before us. At any time before judgment petitioner could have defeated respondent's claim by placing it in possession of this land. But, to quote the language of the trial court:

(R. p. 18:) "The act (of June 21, 1906) clearly contemplated the restoration of the land to the Creek Indians through appropriate administrative action . . . . Government officials having charge of the affairs of the Creek Nation took no steps . . . and the matter was allowed to drift . . . until May 24, 1924, when jurisdiction was conferred on this court to 'hear, examine and adjudicate and render judgment' on plaintiff's claim.

"The plaintiff, being the owner of the land, is legally and equitably entitled to be placed in possession of it. The court, however, is without authority to put the plaintiff in possession of the land, and has jurisdiction only to render a money judgment for its value."

Petitioner's Third Question.

"(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or any interest therein by the United States."

As petitioner answers its own question on page 12 of its petition we quote:

"A taking is not accomplished by an act of an executive officer of the Government without such authority (an act of Congress) whether the act be intentional or otherwise."

We respectfully submit that the petition should be denied.

Respectfully submitted,

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